

## REMARKS

The Examiner noted that claims 1-29 and 32-40 were pending. Applicant has amended claims 1-3, 5, 6, 10-12, 14-17, 19-20, 23-29, 32, 34, and 36-40 without disclaimer or prejudice regarding the subject matter therein, leaving claims 1, 15, 27, 32, and 40 as independent claims. All of the amended claims conform to United States Patent and Trademark Office rules and do not add new matter to the application.

Support for a “concentrated, medial and inward traction member” that provides “concentrated, medial and inward pressure” (claims 1-29); and a “concentrated, medial and inward traction strap” that provides “concentrated, medial and inward pressure” (claims 32-40) is found, *e.g.*, on page 7, lines 27-32; page 8, lines 1-4; page 9, lines 16-18; and page 10, lines 2-21 of the Specification; and Figs. 1 and 2a-2c.

Applicant submits that none of these claims are either taught or suggested by the prior art. Applicant therefore requests that the Examiner renew examination of, and allow, these claims as amended, which Applicant respectfully submits are in condition for allowance as noted below.

### **Request for Acknowledgement of IDS References**

Applicant notes that the Examiner has not yet clearly indicated review of the non-patent literature references first submitted with an IDS on March 10, 2004 and again in part on November 20, 2006. Applicant believes this to be no more than an unintended oversight and kindly requests that the Examiner indicate review of these references in the next Office Action.

### **Interview Summary and Declaration**

Applicant appreciates Examiner’s willingness to conduct a telephonic interview, dated December 2, 2009, and thanks the Examiner for the Interview Summary provided. Applicant notes again Applicant’s recorded notes of the interview:

- (1) Inventor Dean Cropper explains the fundamental change in approach to patella bracing represented by inward tracking toward the posterior of a knee;
- (2) We discussed whether “active” was explicitly found in the specification, as opposed to “continuous and consistent[;]”
- (3) Examiner suggested possible use of the word “unobstructed” to define the “inward” member or strap, and/or the pressure exerted thereby;

- (4) We discussed “tracking” as it is defined in relevant medical literature, noting that it would not include the passive capabilities, if any, disclosed or suggested by the prior art references;
- (5) The Examiners asserted that Labour and Lehman are capable of performing the then claimed structure; and
- (6) When asked, the Examiner did not comment on whether the previous Declaration of Christopher Powers, Ph.D. had been considered, but Examiners required that a relevant Declaration have all of the particular amended language-at-issue

Applicant also appreciates the Examiner’s comments about the earlier-submitted declaration and her review thereof.

#### **Objections to the Specification**

The Specification was objected to allegedly for not providing antecedent basis for the claimed subject matter. Without prejudice or disclaimer on this issue, Applicant respectfully requests that the Examiner withdraw this objection in view of the foregoing claim amendments.

#### **Rejections under 35 U.S.C. § 112, first paragraph**

Claims 1-3, 4, 5, 10-12, 15, 17, 19, 20, 23-29, 32, 34 and 36-40 (and others as dependant claims) were rejected under 35 U.S.C. § 112, first paragraph as allegedly failing to comply with the written description requirement. Without prejudice or disclaimer on this issue, Applicant respectfully requests that the Examiner withdraw this rejection in view of the foregoing claim amendments.

#### **Rejections under 35 U.S.C. § 102**

**Neither Labour nor Lehman anticipates the claims because they:**

- (1) do not necessarily teach at least one of the structural limitations recited within claims 1, 15, 27, 32 or 40, and indeed**
- (2) cannot perform these limitations’ recited functions.**

#### **Labour**

Claims 1-3, 5-8, 13-17, 19-21, 26-29, 32 and 36-37 were rejected as being anticipated by United States patent number 4,445,505 (“Labour”).

Applicant respectfully submits, however, that the Examiner allow the claims as amended at least for the following reasons:

Labour does not explicitly teach the following illustrative limitations of these claims:

a concentrated, medial and inward traction member that operatively fits over,

and provides concentrated, medial and inward pressure against, the patella;  
wherein the concentrated, medial and inward traction member provides a compressive force against the patella, thereby increasing the contact surface area between the patellofemoral articular tissue and an associated femoral trochlear groove.

Labour does not inherently teach the structural limitation, “concentrated medial and inward traction member”, or its recited function, *i.e.*, in which it “provides concentrated, medial and inward pressure” because these features are not *necessarily* present in Labour. “To establish inherency, the extrinsic evidence ‘must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. ‘The mere fact that a certain thing may result from a given set of circumstances is not sufficient.’” *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999).” *Manuel of Patent Examining Procedure* § 2112, IV, Eight Ed., August 2001, Latest Rev., August 2006 (“M.P.E.P.”) (*emphasis added*).

Thus, Labour’s strap 80 would not be recognized by one having ordinary skill in the art as being a “concentrated, medial and inward traction member[.]”

This is illustrated, *e.g.*, by the below referenced Wikipedia entry indicating that “traction” as reasonably used in the medical field denotes an active force not found in, or capable of being performed by, Labour’s or Lehman’s devices. See [http://en.wikipedia.org/wiki/Traction\\_\(orthopedics\)](http://en.wikipedia.org/wiki/Traction_(orthopedics)).

As such, Applicant submits that the rejections are traversed with regard to Labour for all of the independent claims, which have either a concentrated, medial and inward traction member or a concentrated, medial and inward traction strap.

#### **Lehman**

Claims 1-8, 13-21, 26-29, 32-37 and 40 were rejected as being anticipated by United States patent number 3,804,084 (“Lehman”).

Applicant respectfully submits, however, that the Examiner allow the claims as amended at least for the following reasons:

Lehman does not explicitly teach the following limitations of these claims:

a concentrated, medial and posterior traction member that operatively fits over, and provides concentrated, medial and inward pressure against, the patella;  
wherein the concentrated, medial and inward traction member provides a compressive force against the patella, thereby increasing the contact surface area

between the patellofemoral articular tissue and an associated femoral trochlear groove.

Lehman does not inherently teach the structural limitation, “concentrated medial and inward traction member”, or its recited function, *i.e.*, in which it “provides concentrated, medial and inward pressure” because these features are not *necessarily* present in Labour. “To establish inherency, the extrinsic evidence ‘must make clear that the missing descriptive matter is *necessarily* present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. ‘The mere fact that a certain thing may result from a given set of circumstances is not sufficient.’” *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999).” *Manuel of Patent Examining Procedure* § 2112, IV, Eight Ed., August 2001, Latest Rev., August 2006 (“M.P.E.P.”) (*emphasis added*).

Thus, Lehman’s strip 90 would not be recognized by one having ordinary skill in the art as being a “concentrated medial and inward traction member[.]”

This is illustrated, *e.g.*, by the below referenced Wikipedia entry indicating that “traction” as reasonably used in the medical field denotes an active force not found in, or capable of being performed by, Labour’s or Lehman’s devices. See [http://en.wikipedia.org/wiki/Traction\\_\(orthopedics\)](http://en.wikipedia.org/wiki/Traction_(orthopedics)).

As such, Applicant respectfully submits that the rejections are traversed with regard to Lehman for all of the independent claims, which have either a concentrated, medial and inward traction member or a concentrated, medial and inward traction strap.

#### **Rejections under 35 U.S.C. § 103**

**Neither Labour nor Lehman inherently teach the limitations missing from Cawley or Lamping**

#### **Labour in view of Cawley**

Claims 4, 9-12, 18, 22-25, 33-35 and 38-40 were rejected as being obvious over Labour in view of United States patent number 6,551,264 (“Cawley”) and/or Lehman.

Claims 9-12, 22-25, 38 and 39 were rejected as being obvious over Labour in view of Cawley

At least in view of the above-recited reasoning, however, Applicant respectfully submits that all of these claims are in condition for allowance. In short, none of Labour, Lehman or Cawley teaches or suggests, either inherently or explicitly, a concentrated, medial and inward traction member (or a concentrated, medial and inward traction strap), at least one of which is a structural element in independent claims 1, 15, 27, 32 and 40. *Moreover, the art is replete with evidence that teaches away from the use of a concentrated, medial and inward traction member (or a*

*concentrated, medial and inward traction strap). Nearly every, if not every, knee brace in the prior art - in some way, shape, or form - teaches a protective nest or opening about the wearer's patella.*

**Labour or Lehman in view of Lamping**

Claim 13 was rejected as being obvious over Labour (or alternately Lehman) in view of United States patent number 6,485,448 ("Lamping")

At least in view of the above-recited reasoning, however, Applicant respectfully submits that all of these claims are in condition for allowance. In short, none of Labour, Lehman or Lamping teaches or suggests, either inherently or explicitly, a concentrated, medial and inward traction member (or a concentrated, medial and inward traction strap), at least one of which is a structural element in independent claims 1, 15, 27, 32 and 40. *Moreover, the art is replete with evidence that teaches away from the use of a concentrated, medial and inward traction member (or a concentrated, medial and inward traction strap). Nearly every, if not every, knee brace in the prior art - in some way, shape, or form - teaches a protective nest or opening about the wearer's patella.*

**Date of Applicant's actual reduction to practice**

Applicant also refers the Examiner to the Declaration of Dean E. Cropper under 37 CFR § 1.131, submitted June 1, 2007, in which Applicant hereby shows actual reduction to practice, prior to March 29, 2002, of subject matter covered by all of independent claims 1, 15, 27, 32 and 40.

At least for all of the forgoing reasons, Applicant respectfully requests that the examiner reexamine and allow all of claims 1-29 and 32-40.

Respectfully submitted,

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